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January 13, 2017

Hon. Lawrence E. Strickling  
Assistant Secretary for Communications and Information and  
Administrator, National Telecommunications and Information Administration  
U.S. Department of Commerce  
1401 Constitution Avenue N.W.  
Washington, D.C. 20230

Dear Mr. Strickling:

**RE: Racial Discrimination in Internet Commerce**

The Multicultural Media, Telecom and Internet Council (“MMTC”) extends this letter to draw NTIA’s attention to the growing and profoundly troubling problem of “Application (App) Redlining” – a new method of institutionalizing online racial discrimination in commerce, housing, banking, employment, transportation, and public accommodations. As society sees more incidences of this type of negative online profiling, we believe that it merits the oversight of NTIA’s privacy policy review process. If it is unclear which regulatory authorities should have jurisdiction over this practice, we ask that NTIA confer with the White House to consider establishing an Inter-Agency Task Force to study the problem and recommend legislation, inter-agency agreements, agency rulemakings, or other methods to bring these practices under control.

**THE PROBLEM OF APPLICATION REDLINING**

The use of consumer data in technology has grown exponentially within the past decade. The collection and aggregation of “big data” have led private companies to know their customers’ race and ethnicities, shopping habits, and even medical care needs. With the growth of online shopping, social media, and mobile applications, companies gather more information about consumers than ever before. While this information about customers’ habits can be useful for developing and innovating new products and services, “big data” also assembles predictive analytics about individual consumer preferences that, in turn, can lead to predatory individualized and specialized marketing practices.<sup>1</sup> When big data

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<sup>1</sup> See FEDERAL TRADE COMMISSION, BIG DATA: A TOOL FOR INCLUSION OR EXCLUSION (2016).

is inappropriately used or interpreted, predatory schemes that afflict members of vulnerable communities can both target and limit their access to particular online services, educational opportunities, or job openings,<sup>2</sup> which can lead to explicit discrimination in a variety of contexts and industries.

The practice of geographic redlining – a precursor to app redlining – has a long history of keeping people of color out of schools, banks, and, most notoriously, homes. The Federal Housing Administration (FHA) used redlining policies to “explicitly refuse to back loans to black people or even other people who lived near black people.”<sup>3</sup> The FHA graded neighborhoods from A to D and based their loan decisions on whether an individual lived within those neighborhoods. Families who lived in C or D graded neighborhoods were denied loans while those living in A or B neighborhoods were granted them. Not surprisingly, this disproportionately affected the African American population and where they could live.

While anti-discrimination laws such as the Civil Rights Act of 1964 and the Fair Housing Act have made geographic redlining illegal, historically disadvantaged populations are still subjected to housing discrimination. As recently as 2015, the New York Attorney General settled a lawsuit against Evans Bank under the Fair Housing Act for their redlining practices.<sup>4</sup> Since at least 2009, Evans Bank systematically denied residential mortgage products to African American residents in the Buffalo metro area despite their creditworthiness.<sup>5</sup> According to a map of the racially segregated city of Buffalo, Evans Bank marketed mortgage products and opened branches primarily in the predominately white Westside of Buffalo while the majority black Eastside was devoid of any services. This “trade area” has perpetuated segregated housing patterns and prevented Eastside residents from gaining access to credit.<sup>6</sup> The Attorney General argued that these practices not only harmed the residents of Eastside, but also the state of New York by “slowing the revival in housing and impeding the economic recovery.”<sup>7</sup>

Like traditional housing redlining, the new practice of application redlining can disproportionately affect minorities. Companies like Google have been criticized for apparent discriminatory advertising practices in their various applications, including

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<sup>2</sup> *Id* at 2.

<sup>3</sup> Alexis C. Madrigal, *The Racist Housing Policy That Made Your Neighborhood*, THE ATLANTIC (May 22, 2014), <http://www.theatlantic.com/business/archive/2014/05/the-racist-housing-policy-that-made-your-neighborhood/371439/> (last visited May 1, 2016).

<sup>4</sup> Jessica Silver-Greenberg and Michael Corkery, *Evans Bank Settles New York ‘Redlining’ Lawsuit*, THE NEW YORK TIMES (September 10, 2015), [http://www.nytimes.com/2015/09/11/business/dealbook/evans-bank-settles-new-york-redlining-lawsuit.html?\\_r=1](http://www.nytimes.com/2015/09/11/business/dealbook/evans-bank-settles-new-york-redlining-lawsuit.html?_r=1) (last visited May 1, 2016).

<sup>5</sup> Complaint and Demand for Jury Trial, *New York v. Evans Bancorp, Inc.*, No. 1:14-cv-00726 (W.D.N.Y. 2014).

<sup>6</sup> *Id.* at 7.

<sup>7</sup> *Id.*

Gmail. In 2011, tech writer Nathan Newman conducted an experiment to determine whether Gmail's advertisements were based on racial profiling. Newman created nine different accounts with different ethnic names ("white," Latino, and "black" names), then had each account create an email with the same subject line.<sup>8</sup> "Connor Erickson" used Gmail to create an email with the subject "Arrested: need lawyer" and saw relevant ads for criminal and fraud attorneys. However, when "DeShawn Washington" created the same email, he only saw ads for DUI attorneys.<sup>9</sup> The same thing happened when searches were made for education and the purchase of new cars.

Google denied these claims, but did admit that it read emails and used search history to determine which ads to display for each user.<sup>10</sup> In another 2011 Google experiment conducted by UCLA Professor Safiya Umoja Noble, the words "black girls" pulled up mostly pornographic and sexually explicit content.<sup>11</sup> The hypersexualized representation of black girls has declined, and today the same search pulls up sites for "Black Girls Code" and "Black Girls Rock." To this same end, a recent comparative search of "three black teenagers" and "three white teenagers" pulled up vastly different images of young people.<sup>12</sup> The former generated an array of police mug shots of young, African American males, while the latter produced groups of smiling subjects.<sup>13</sup>

With the introduction of social media platforms, the issue of online racial profiling has transformed into a beast of another form. One example of this new form of discrimination takes place on Nextdoor.com, which is a popular social networking website that allows residents of neighborhoods to connect and send messages to each other. Residents can post about anything from free furniture giveaways to fruit in their backyards. However, under the "Crime and Safety" section of the site, neighbors often post unsubstantiated "suspicious activity" warnings that result in the police being unfairly called to investigate

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<sup>8</sup> Jenee Desmond-Harris, *Google Ads: Based on Racial Profiling?*, THE ROOT (Sept. 22, 2011, 11:57 AM), [http://www.theroot.com/articles/culture/2011/09/google\\_ads\\_based\\_on\\_racial\\_profiling.html](http://www.theroot.com/articles/culture/2011/09/google_ads_based_on_racial_profiling.html) (last visited May 21, 2016); Willard Foxton, *Google Denies Racial Profiling via Gmail*, THE TELEGRAPH BLOGS (Sept. 4, 2012), <http://www.telegraph.co.uk/opinion> (last visited May 21, 2016); Reniqua Allen, *Google Ads – Racial Profiling*, POLITIC365 (Oct. 2, 2011, 6:00 PM), <http://politic365.com/2011/10/02/google-ads-%E2%80%94-racial-profiling/> (last visited May 21, 2016); *Racial Profiling in Your Own E-Mails?*, HISPANICALLY SPEAKING NEWS (Sept. 24, 2011 3:47 PM), <http://www.hispanicallyspeakingnews.com/notitas-denoticias/archives/2011/09/24/> (last visited May 21, 2016).

<sup>9</sup> *Id.*

<sup>10</sup> Foxton, *supra* note 8.

<sup>11</sup> Harris, *supra* note 8.

<sup>12</sup> Jessica Guynn, *Three Black Teenagers Google Search Sparks Outrage*, USA Today (June 10, 2016), <http://www.usatoday.com/story/tech/news/2016/06/09/google-image-search-three-black-teenagers-three-white-teenagers/85648838/>

<sup>13</sup> *Id.*

innocent black residents.<sup>14</sup> Users have suggested that black mailmen and salesmen are burglars, organized calls to police to complain black residents are “too noisy” in public parks and bars, and have called the police to report “suspicious” black and Hispanic men standing near bus stops.<sup>15</sup> One user even went as far as posting a picture of a young black boy who did not pick up his dog’s droppings while another suggested the police should be called on him.<sup>16</sup>

Groups who choose to speak up against this level of racial profiling are often silenced on the website and have even had their comments removed by the “leads” of the neighborhood group.<sup>17</sup> When a group complained to Nextdoor about a city of Oakland lead’s behavior, the lead was removed from his position, but later that same day the website backtracked and added him as a lead again.<sup>18</sup> Nextdoor has attempted to mitigate these behaviors by introducing guidelines to prevent racial profiling and discriminatory posts on the site.<sup>19</sup> These new guidelines specifically explain and prohibit discriminatory and racial profiling posts. Additionally, the guidelines give examples of posts that display that discriminatory behavior, and examples of posts that members should model their posts after giving a full description of the “suspicious behavior” and not just the race of the suspect.<sup>20</sup>

Another example of selective online service is Amazon Prime’s One-Day shipping.<sup>21</sup> The company asserts that certain services are unavailable in certain areas because its plan “is to focus its same-day service on ZIP codes where there is a high concentration of Prime members, and then expand the offering to fill in the gaps over time.”<sup>22</sup> While this may appear to be the cost-effective approach for Amazon, it actually ends up isolating places where minorities live.<sup>23</sup>

Meanwhile, other examples of application redlining abound. The ease by which apartment owners using short-term rental services such as Airbnb can engage in racial discrimination plainly would offend Title II of the 1964 Civil Rights Act if Airbnb is

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<sup>14</sup> Sam Levin, *Racial Profiling via Nextdoor.com*, EAST BAY EXPRESS (Oct. 7, 2015), <http://www.eastbayexpress.com/oakland/racial-profiling-via-nextdoorcom/Content?oid=4526919> (last visited May 21, 2016).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* Leads manage their neighborhood’s Nextdoor Crime and Safety Resources section and can remove inappropriate messages and close comment threads.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> David Ingold and Spencer Soper, *Amazon Doesn’t Consider the Race of its Customers. Should it?*, BLOOMBERG (April 21, 2016), <http://www.bloomberg.com/graphics/2016-amazon-same-day/index.html> (last visited May 21, 2016).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

considered the housing provider – but would fall under the fewer-than-five rooms exemption and thus would be unremediable if each homeowner is considered a separate housing provider.<sup>24</sup> Another example is Facebook’s recent retraction of a new advertising feature that would allow advertisers to exclude certain populations from targeted marketing campaigns, particularly those focused on housing, employment, and creditworthiness.<sup>25</sup> If not discovered by Pro Publica,<sup>26</sup> the new feature would have allowed advertisers to discriminate against consumers based on their racial and ethnic categorization, which is developed through the social media giant’s micro-targeting of consumers’ data.

Evidently, these types of blatant race discrimination are quite widespread. Applications in their design and intended use are being deployed to reinforce and perpetuate racial stereotyping for profit. Companies that profit from this behavior are doing little to change that culture of use or to proscribe the misuse of their products. Presently, there is no remedy for it.<sup>27</sup>

### **DESIRABILITY OF AN INTER-AGENCY TASKFORCE**

No one regulatory agency governs the Internet. Because of this, no agency has ever taken the lead on the issue of application redlining. While both the Federal Trade Commission and the Federal Communications Commission have some regulatory authority over Internet commerce, the scope of their authority is indeterminate, and some of the agencies’ authority may overlap.

Additionally, the issue of application redlining affects more agencies and stakeholders than just the FTC and the FCC. Data algorithms that include information like zip codes and buying pattern history can directly and indirectly cause discrimination in housing, lending, access to credit and insurance, educational opportunities, and discriminatory

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<sup>24</sup> Recently Airbnb announced a plan to attempt to minimize the potential for discrimination. See Patrick Kulp, *Airbnb shows it takes discrimination seriously with new ad campaign*, Mashable (November 12, 2016), <http://mashable.com/2016/11/12/airbnb-ad-campaign-discrimination/#WtMrwpDfI5q7> (last visited November 14, 2016).

<sup>25</sup> Sapna Maheshwari and Mike Isaac, *Facebook Will Stop Some Ads from Targeting by Race*, New York Times (November 11, 2016), <http://www.nytimes.com/2016/11/12/business/media/facebook-will-stop-some-ads-from-targeting-users-by-race.html> (last visited November 12, 2016).

<sup>26</sup> Julia Angwin and Terry Parris, *Facebook Lets Advertisers exclude by Race*, (October 28, 2016), <https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race> (last visited November 12, 2016).

<sup>27</sup> See Aaron Belzer and Nancy Leong, *Can Civil-Rights Law Stop Racial Discrimination on AirBnb*, Washington Post (May 2, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/05/01/can-civil-rights-law-stop-racial-discrimination-on-airbnb/> (last visited May 21, 2016).

policing practices. Thus, the FDIC, and the Departments of Housing and Urban Development, Education, Commerce, and Justice, among others, should have an interest in the direction of federal regulation of application redlining.

When several agencies or departments are impacted by a new social problem, the White House has not hesitated to pull together an inter-agency task force to come up with a holistic, government-wide remedy. For example, on February 9, 2016, President Obama issued an executive order to establish the Federal Privacy Council.<sup>28</sup> The Council is made up of 24 federal agencies including the Department of State, Treasury, Defense, Interior, Transportation, Education, and National Archives.<sup>29</sup> The goal of the task force is to develop recommendations for the Office of Management and Budget regarding federal government privacy policies and requirements.<sup>30</sup>

Another example: since 2013, the United States Department of State has maintained a task force to combat human trafficking. The task force makes reports on progress made, victim services, rule of law, public awareness, and outreach.<sup>31</sup> The task force is made up of various federal agencies including the Department of Defense, Policy Council, Federal Bureau of Investigation, National Security Staff, Health and Human Services, Education, and Transportation.<sup>32</sup>

In addition to these two task forces, there are countless others in various sectors including the military, law enforcement, and the arts.<sup>33</sup>

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<sup>28</sup> Press Release, White House, Executive Order – Establishment of the Federal Privacy Council (Feb. 9, 2016) <https://www.whitehouse.gov/the-press-office/2016/02/09/executive-order-establishment-federal-privacy-council> (last visited May 21, 2016).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *President's Interagency Task Force to Monitor and Combat Trafficking in Persons*, U.S. DEPARTMENT OF STATE <http://www.state.gov/j/tip/response/usg/> (last visited May 1, 2016).

<sup>32</sup> *Id.*

<sup>33</sup> *Task Force on Military and Veterans Affairs*, NATIONAL CONFERENCE OF STATE LEGISLATURE <http://www.ncsl.org/ncsl-in-dc/task-forces/task-force-on-military-and-veterans-affairs.aspx> (last visited May 4, 2016); FEDERATION OF AMERICAN SCIENTISTS, <http://fas.org/man/dod-101/navy/unit/task-force.htm> (last updated July 28, 1999); MILITARY LAW TASK FORCE OF THE NATIONAL LAWYERS GUILD, <http://nlgmtf.org> (last visited May 4, 2016); Press Release, NATO, The Combined Task Forces Concept, <http://www.nato.int/docu/comm/1999/9904-wsh/pres-eng/16cjtf.pdf> (last visited May 21, 2016).

### **RECOMMENDATION**

After two generations of progress toward steadily eradicating discrimination in commerce, housing, banking, employment, transportation, and public accommodations, the prevalence of application redlining now threatens to create a technological “end-run” around the legal protections devised by Congress long before the Internet was created.

It is imperative that the appropriate federal agencies and departments move rapidly to stop this profound threat to equal opportunity. Whether through NTIA’s privacy review or otherwise, the administration should move expeditiously. Inasmuch as several agencies are impacted, the creation of an Inter-Agency Task Force may be the most effective immediate step that should be taken. Among the recommendations such a Task Force might consider are the following:

- 1) The need for equal employment opportunity in these emerging industries where implicit and explicit bias are bound to affect online services;
- 2) The desirability of a civil rights enforcement body focused on online consumer privacy to set up checks and balances between online and offline judicial, regulatory, and human rights privacy policies; and
- 3) The creation of best practices on misleading language that should not be welcome in the online space – much like what Google did with the removal of AdWords supporting payday lenders. NTIA is uniquely positioned to ensure that commerce and commerce-related activities are not poisoned by bad actors.

As the leading civil rights organization in the media, telecom, and high tech fields, MMTC stands ready to assist NTIA and both the outgoing and incoming administrations in addressing this critical issue.

Sincerely,

*Kim M. Keenan*

Kim M. Keenan  
President and CEO

cc: Maureen Lewis, Esq.  
Director, Minority Telecommunications Development Program